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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1958

No. 206

LORENZO WHITE, JOYCE HARPER and RUBY FIELDS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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BOYKO, TAPPOL & TULIN.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

Petitioners above named pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on April 11, 1958.[1]

[1]Rehearing denied, June 25, 1958.

OPINION BELOW.

No opinion was rendered by the District Court for the District of Alaska, Fourth Judicial Division, in this case. The opinion of the Court of Appeals, affirming judgments filed and entered in said District Court on June 6, 1957, was rendered and filed on April 11, 1958. It is reported in 254 F. 2d 137 and is printed in Appendix A hereto.

JURISDICTIONAL STATEMENT.

(a) The judgment of the Court of Appeals for the Ninth Circuit, affirming three judgments of conviction entered on June 6, 1957, by the District Court for the District of Alaska, Fourth Judicial Division, and here sought to be reviewed, was dated and entered on April 11, 1958. It is printed in Appendix B hereto.

(b) Petition for Rehearing and for a hearing *en banc*, timely filed on May 8, 1958, was denied by the said Court of Appeals on June 25, 1958. The Court of Appeals has stayed its mandate pending the filing and consideration of this petition for writ of certiorari.

(c) Jurisdiction is conferred upon this Honorable Court to review the judgment of the Court of Appeals by 28 U.S.C. 1254(1), this petition for certiorari being filed within the time prescribed by Rule 38 of this Court, pursuant to 18 U.S.C. 3772.

QUESTIONS PRESENTED.

1. *Does interception en route and cutting open of a sealed and insured air mail parcel and the removal of its contents by federal law enforcement officers, without a warrant, constitute an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States?*

2. *Where federal officers incident to an arrest, without warrant, on a charge of violating federal narcotics laws, conduct a search, without a search warrant, of a dwelling then occupied by the accused, and, without consent, take into their possession certain cleaning labels, not directly connected with the charged offense, but to be used as circumstantial evidence (for purposes of identification of the accused), does such conduct constitute a violation of rights protected by the Fourth and Fifth Amendments to the Constitution?*

3. *Does refusal of the trial court to return the articles seized as above stated and permitting them in evidence amount to a denial of the immunity from unreasonable searches and seizures and the protection against self-incrimination afforded by the Fourth and Fifth Amendments to the Constitution of the United States?*

STATUTES INVOLVED.

The constitutional and statutory provisions involved are as follows:

(a) The Fourth Amendment to the Constitution of the United States, which reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(b) The Fifth Amendment to the Constitution of the United States, which reads in pertinent part:

"* * * nor shall any person * * * be compelled in any criminal case to be a witness against himself * * *."

(c) 39 U.S.C. 475 (Act of June 29, 1948, 62 Stat. 1097), which reads in pertinent part as follows:

"*Air parcel-post service; rates; rules and regulations; adjustment of weight limits, zones, and rates, etc.* The rate of postage on mailable matter exceeding eight ounces in weight, but not weighing more than seventy pounds nor measuring more than one hundred inches in length and girth combined, when carried by air and including other transportation to and from air-mail routes, shall, except as otherwise provided in this Section, be determined on the basis of the eight postal zones established for fourth-class matter, as follows: * * *."

(d) The statutes under which petitioners were convicted, but which are not directly involved herein, are Sections 4724(b) and 7237 of the Internal Revenue Code of 1954 (Title 26, U.S.C.); 18 U.S.C. 371 and 1716; and 21 U.S.C. 174.

STATEMENT OF THE CASE.

The jurisdiction of the District Court below was based upon 48 U.S.C. 101. The jurisdiction of the Court of Appeals for the Ninth Circuit was invoked pursuant to 28 U.S.C. 1291 and 1294.

Petitioners were jointly indicted, tried and convicted, based upon the following charges:

1. Violation of Section 4724(b) of the Internal Revenue Code of 1954, 26 U.S.C. 4724(b)—transportation of a narcotic drug;

2. Violation of 21 U.S.C. 174—importation of a narcotic drug;

3. Violation of 18 U.S.C. 371 (2 counts each)—conspiracy; and

4. Violation of 18 U.S.C. 1716 (as to petitioner Fields only)—mailing of a poisonous drug.

In the course of the trial the District Court denied motions to suppress, and overruled objections against admission of, the following described exhibits (see Appendix C, *infra*), which were thereafter admitted into evidence and which represent virtually all of the case of the government against petitioners (defendants below):

(1) Government's Exhibit F—a cardboard box and brown paper wrapper constituting the outer coverings of a sealed air mail package sent through the mail by petitioner Fields.

(2) Government's Exhibit H—part of a dress (with identifying cleaning label attached) con-

tained in the aforementioned package and removed therefrom by federal officers.

(3) Government's Exhibit I—the other part of the dress offered as Government's Exhibit H, above.

(4) Government's Exhibit J—two glassine envelopes alleged to have been found in the package, wrapped in the fold of the dress.

(5) Government's Exhibit K—a box containing a small quantity[2] of heroin (TR 158) alleged to have been removed by Federal agents from the glassine envelopes (Government's Exhibit J, above).

(6) Government's Exhibit O—a velvet belt (with identifying cleaning ticket attached), belonging to petitioner Ruby Fields, and taken from her home by federal officers.

(7) Government's Exhibit P—a detached cleaning tag taken from such home by federal officers.

(8) Government's Exhibit Q—another detached cleaning tag taken from such home by federal officers.

A tabulation showing the aforementioned exhibits, their nature, use in evidence, manner of obtention by federal officers and pertinent motions of petitioners (defendants below), together with disposition thereof

[2] 7.65 grams, or the equivalent of slightly over ¼ ounce.

by the District Court, are set forth as Appendix C hereto.

The evidence given at the trial, built around these tangible exhibits, may be summarized as follows:

During December 1955, petitioner White operated a night club in Fairbanks, Alaska, known as the Morocco Club (Transcript of Record, page 41). Petitioners Harper and Fields were employed at this club and Petitioner Harper also roomed at a house located at 721 Sixteenth Street, Fairbanks, Alaska, which was owned by White (TR 41, 42, 232). On December 11, 1955, petitioner Fields, an admitted narcotics addict, left Fairbanks and returned to the home of her mother in Los Angeles, California. While there, she mailed a sealed and insured air mail package, addressed to one Myrtle Hicks, containing a dress in the folds of which, it is alleged, there was contained a glassine envelope or envelopes containing a small quantity of heroin (TR 220-223). On December 14, 1955, one Robert Thompson, a Deputy United States Marshal, requested the postmistress of Fairbanks, Alaska, a Mrs. Boyle, to look for a package mailed from Los Angeles to "a fictitious person" in Fairbanks (TR 45). On December 15, Mrs. Boyle examined all the parcels that came from Los Angeles and because the name Myrtle Hicks was unknown to her,[3] she assumed it to be fictitious

[3]The 1955 official estimate of the population of Fairbanks, Alaska (excluding the military and their dependents), is 10,500, according to the Encyclopedia Britannica. The record does not disclose whether or not there is a Myrtle Hicks.

(TR 71, 72). Accordingly, Mrs. Boyle, together with Deputy U.S. Marshal Thompson, U.S. Marshal Al Dorsh and a postal official named Brady, opened the package with a knife. Deputy Marshal Thompson took out its contents, consisting of a blue satin dress. While this was examined, it is alleged, a small packet fell out containing the small quantity of heroin mentioned above (TR 74, 84). The dress was also found to contain an identifying cleaning tag, later offered in evidence as Government's Exhibit H (TR 49, 133, 134, 201). During the examination Deputy Marshal Thompson tasted the powder contained in the package and "it appeared to be a substance known as heroin, to me" (TR 48).

After Deputy Marshal Thompson had tasted the contents of the package and had examined the cleaning label, the package was re-wrapped and placed in the post office vault. Thereafter, on December 20, a search warrant was obtained by the U. S. Marshal's office for the package, on the strength of which it was taken from the post office and forwarded to the F.B.I. laboratories in Washington, where it was examined and analyzed and returned to Fairbanks for use at the trial (TR 48, 49, 52, 53). There is no contention that any search warrant was obtained prior to December 20 by anyone, nor that there was any other authorization for the interception, cutting open, inspection, and seizure of the contents, of the package, on December 15, except for a telephone call to a postal inspector in Seattle (TR 52, 84). On December 27, 1955, two Federal Treasury agents, named Goodman

and Carpenter, called at the home then occupied by petitioner Ruby Fields, in Los Angeles, and, without a warrant, placed petitioner Fields under arrest (TR 182-185, 194, 195). Without the owner's consent, they searched the premises, and found and seized a belt with a dry cleaning label attached to it, and two cleaning tags, one on top of a dresser, and the other in a jewel case on a night stand located in the home where Ruby Fields was arrested (TR 190, 193, 198, 199). At the time the arresting officers had neither a warrant for petitioner's arrest nor a search warrant, although a warrant for her arrest was alleged to have been issued and to be *en route* from Fairbanks (TR 195). The items so seized were subsequently admitted into evidence, over objection, as Government's Exhibits O, P and Q, for the purpose of linking petitioner with the contents of the package previously seized, referred to above (see Appendix C hereto).

There was no evidence linking petitioners White and Harper to the *corpus delicti* other than testimony that Harper and Fields were employed by White and that Harper lived in the property owned by him and that, on December 15, 1955, a cab driver received a call to go to 721 Sixteenth Street, Fairbanks, where defendants White and Harper were alleged to be living. Also, that Harper asked the cab driver to pick up the mail and gave him a note with the name Myrtle Hicks written on it, which he was to present at the post office when he called for the mail. It is claimed that on December 16, 1955, another cab driver was sent by White to the post office to pick up a package for Myrtle Hicks

and attempted to deliver it to 731 *(sic)* Sixteenth Street at Fairbanks (the address on the parcel) but was unable to find the place (TR 106), when he went looking for it, accompanied by another U.S. Deputy Marshal, named McRoberts. The cab driver and the Deputy Marshal next proceeded to 721 Sixteenth Street, where an attempt was made to deliver the package to petitioner Harper, who refused to accept it. In fact, no delivery was ever made and the package was retained by law enforcement authorities until its use at the trial (TR 75). From the foregoing it will be seen that conviction of all the defendants below (petitioners herein) was based virtually entirely upon the government's ability to introduce into evidence the items obtained, as petitioners contend, by unlawful searches and seizures. Timely motions[1] for the suppression of this evidence were denied and objections to their admission in evidence were overruled (Appendix C).

REASONS FOR GRANTING THE WRIT.

1. THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN THIS CASE HAS, IN EFFECT, DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Although it does not appear from the *per curiam* opinion below, the net effect of the decision here

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[1] See *Ganci v. United States*, (CCA 2d, 1923), 287 F. 60; and *cf.* Rule 41(e), F.R.Cr.P. (NB. that the trial court did, indeed, "entertain" the motions and denied them on the merits).

sought to be reviewed is to let stand convictions obtained in violation of constitutional rights of petitioners guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States, and in direct conflict with the decision of this Honorable Court in *Ex Parte Jackson*, (1878), 96 U.S. 724, 24 L. ed. 877. In that case this Court said explicitly that "letters and sealed packages (subject to letter postage) in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if retained by their senders in their own domicils. * * *. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with this postal service any authority to invade the secrecy of letters and such sealed packages in the mails; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth Amendment of the Constitution." The holding in this case is cited with apparent approval (by both the majority and the minority) in *Olmstead v. United States*, (1928), 277 U.S. 438, 460, 464, 475, 49 S.Ct. 564, 72 L.ed. 944, 66 A.L.R. 376.

And compare:

Von Coltzhausen v. Nazro, (1883), 107 U.S. 215, 2 S.Ct. 503, 27 L.ed. 540 (for an early expression of this Court pointing to the proper method to be used in seizing contraband sent through the mail).

This Court in the celebrated *Weeks* case, *(infra)*, on facts not dissimilar to those in the present case, established firmly the constitutional principle that refusal on the part of the trial court to return illegally seized articles and permitting them in evidence amounts to a denial of the immunity from unreasonable searches and seizures afforded by the Fourth Amendment to the Federal Constitution.

> *Weeks v. United States*, (1914), 232 U.S. 483, 43 S.Ct. 341, 58 L.ed. 652, L.R.A. 1915B 834, Ann.Cas. 1915C 1177.

Morever, it has been held that the use of evidence obtained by an unreasonable search and seizure to convict an accused violates his privilege against self-incrimination provided in the Fifth Amendment to the Constitution.

> *Gouled v. United States*, (1921), 255 U.S. 298, 41 S.Ct. 261, 65 L.ed. 647.

And see also:

> *Boyd v. United States*, (1886), 116 U.S. 616, 6 S.Ct. 524, 29 L.ed. 746;

and:

> *Amos v. United States*, (1921), 255 U.S. 313, 41 S.Ct. 266, 65 L.ed. 654.

Even a lawful search by federal officers is restricted by the standards of fair play implicit in the constitutional guarantees to the seizure of contraband or items bearing directly upon the commission of the crime; it may not be abused for the sole purpose of fishing for circumstantial evidence to be used against

the accused at a later trial, without violating his privilege against self-imcrimination.

Gouled v. United States, (supra);

United States v. Lefkovitz, (1932), 285 U.S. 452, 52 S.Ct. 420, 72 L.ed. 877, 82 A.L.R. 775;

Go-Bart Importing Co. v. United States, (1931), 282 U.S. 344, 51 S.Ct. 153, 75 L.ed. 374;

Marron v. United States, (1927), 275 U.S. 192, 48 S.Ct. 74, 72 L.ed. 231.

These cases have been conscientiously followed, thus far, in the various Circuits which have ruled on the issue:

United States v. Poller, (C.C.A. 2d, 1930), 43 F.2d 914, 74 A.L.R. 1382;

United States v. Thomson, (C.C.A. 7th, 1940), 113 F.2d 643, 129 A.L.R. 1291 (search without search warrant, incident to lawful arrest);

United States v. Kirschenblatt, (C.C.A. 2d, 1926), 16 F.2d 202, 51 A.L.R. 416;

Bushouse v. United States, (C.C.A. 6th, 1933), 67 F.2d 843.

The government in the present case seeks umbrage under nice distinctions, adopted for purposes of postal rate making, between first class letter mail and insured air mail packages, based on the quoted provisions of 39 U.S.C. 475, *(vide supra).* Because this statute provides that "the rate of postage on mailable (air parcel-post) matter exceeding eight ounces in

weight * * * shall * * * be determined *on the basis of* the eight postal zones established for fourth-class matter * * *" (italics supplied), it is argued that therefore such a parcel *becomes* fourth-class matter, which under postal regulations may be opened for inspection.[5] This specious reasoning flies directly into the face of the express language of this Court in *Ex Parte Jackson, (supra)*, where it was said that "in the enforcement of regulations excluding matter from the mail, a distinction has to be made between *what is intended to be kept free from inspection*, such as letters and *sealed packages* subject to letter postage, and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, *purposely left in a condition to be examined.*" (Italics supplied.)

loc. cit., at p. 733.

And again, in denying the writ in the *Jackson* case, on the basis of the limited issue then before this Court, respecting the constitutional validity of the controverted statute, the Court, *per* Mr. Justice Field, observed:

> "There is no question before us as to the evidence upon which the conviction of the petitioner was had, nor does it appear whether the envelope in which the prohibited circular was deposited in the mail was *sealed or left open for examination.* (Italics supplied)."
>
> *loc. cit.*, at pp. 736, 737

[5]For purposes of *surface mail*, mailable matter is classified in four categories, by the Act of March 3, 1879, c. 180, 20 Stat. 358, as amended. No such classification is, however, contained in the Air Mail Act of Feb. 2, 1925, (43 Stat. 805, 39 U.S.C. 461, *et seq.*), nor in the Act of June 29, 1948, cited to the text.

thus declaring the true nature of the test beyond any possible doubt.

The government seeks to read into the words "subject to letter postage" a special meaning which would nullify the clear import of the quoted language, to the effect that the true test of the protected privacy in the mails is the intention of the sender, as expressed by his choice of a mode of transmission. At most, a person who mails printed matter in a wrapper especially designed to be conveniently opened for inspection and so designated, may be said to have impliedly consented to the search and thus to have waived the constitutional protection. But is it reasonable to make this claim for the person who sends matter through the mails in a sealed and insured parcel, merely because applicable postal regulations limit "first class" air parcel-post rates, so called, to mailable matter not exceeding eight ounces in weight, and apply rates "determined on the basis of the eight postal zones established for fourth-class matter" to packages weighing in excess of this limit?[6]

Clearly the test applied in the *Jackson* case appears to be whether or not the letter or package is *sealed*, indicating an intent that it be kept free from inspection, rather than "purposely left in a condition

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[6]The purpose would appear to be the collection of higher rates for greater distances, instead of the flat, "subsidized", letter rate. In this connection it should be noted that the classification of this parcel as other than first class mail rests on the unsupported speculation of the witness Boyle with respect to the amount of postage on the (illegible) meterstrip and what it might represent in terms of weight and insurance (TR 75, 76). Neither the court nor counsel evinced curiosity at the claim that a dress, cardboard box and brown paper wrapping (TR 47) supposedly weighed *three pounds!*

to be examined", thus possibly implying a consent or waiver on the part of the sender. The words "subject to letter postage", thus read in context, are easily understood in the light of postal conditions and regulations as they existed at the time of the decision in the *Jackson* case, (1878), when air mail or air parcel post were no more than an object of curious speculation in "Century Magazine" (on the "aeronon of the Twentieth Century") and anything sent sealed became subject to the letter rate, while any person desiring to take advantage of lower mail rates applicable to "newspapers, magazines, pamphlets, and other printed matter" was, by law of Congress, required to permit such matter to be inspected for the purpose of ascertaining its eligibility to enjoy the lower rate. Even under those conditions this Court said that the Constitution limits the congressional power to exclude such matters from the mail and that no law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and "sealed packages" in the mail.

Ex Parte Jackson, (supra), at p. 733.

To the extent that the decision here appealed from acquiesces in the use of collateral evidence, in itself unoffending and obtained without search warrant, incident to the arrest of the petitioner Fields (also without warrant), namely, the belt and cleaning tags (Government's Exhibits O, P and Q) taken from the premises in which the arrest was made, it is also in conflict with the decisions of this Honorable Court in

Gouled v. United States, and *United States v. Lefkowitz, (supra)*, which hold that even a valid search warrant may not be used as a means of securing *evidence* to be used against an accused in criminal proceedings, as distinguished from articles connected with the crime as its fruits, or the means by which it was committed, and also that an arrest may not be used as a pretext to search for such evidence.

See, to the same effect:

Marron v. United States, (supra);

Go-Bart Importing Co. v. United States, (supra);

Harris v. United States, (1947), 331 U.S. 145, 67 S.Ct. 1098, 91 L.ed. 1399; reh. den. 331 U.S. 867, 67 S.Ct. 1527, 91 L.ed. 1871.

And see also decisions of various Courts of Appeals, cited *supra*, at page 13.

To the extent that the decision sought to be reviewed seems to acquiesce in the position of the government, impliedly upheld by the trial court, that the unlawful search and seizure of the sealed package intercepted from the mails was sanctioned by the subsequent obtention (five days later) of a search warrant, it also conflicts with a holding of this Court, to the effect that where property has been seized unlawfully without a warrant, the subsequent issuance of a search warrant and retention of property thereunder does not make the previous search and seizure lawful.

Silverthorne Lumber Co. v. United States, (1920), 251 U.S. 385, 40 S.Ct. 182, 64 L.ed. 319, 24 ALR 1426.

Mr. Justice Holmes, in the case just cited, clearly stated what petitioners comprehend to be still the law of the land, when he struck down the government's attempt to cure, belatedly, its lawless seizure of evidence, with this statement:

> "This proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act.* * * In our opinion such is not the law. It reduces the Fourth Amendment to a form of words.* * * The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but it shall not be used at all. Of course it does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed."
>
> *loc. cit.*, at pp. 391, 392.

It should be noted that in the present case the government did not even take the trouble of pretending to restore the property to its owner and then to seize it back by lawful warrant, in order to take advantage

of its improperly gained knowledge, but simply went through the *pro forma* motions of the warrant to transfer possession from one government agent to another. Petitioners respectfully submit that no such *ad hoc* maneuver could satisfy the Holmesian standards of law-abiding federal law enforcement. It is true, that in the course of the trial petitioner Fields virtually confessed to mailing a small quantity of the narcotic for her own use (TR 219-232). But this evidently does not eradicate the prejudicial effect on her co-defendants nor does it validate a search illegal in its inception.

Nelson v. United States, (CA DC, 1953), 208 F.2d 505;

Nueslein v. District of Columbia, (CA DC, 1940), 115 F.2d 690.

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2. THE RESULT OF THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT SOUGHT TO BE REVIEWED IS IN CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT ON THE SAME MATTER.

In *Oliver v. United States,* (CA 8th, 1957), 239 F. 2d 818, it was held that the attempted seizure from the mails, without warrant, of an air mail letter or package, alleged to have contained heroin, constituted an unreasonable search and seizure in violation of the Fourth Amendment. Here again, the government seeks to escape the clear implication of the *Oliver*

case, which is virtually on all fours with the present case on the facts, by asserting a subtle distinction between first-class air mail and insured air mail packages sent at fourth-class rates because of overweight.[7] There is nothing in the *Oliver* case which would support this distinction,[8] but on the contrary, its holding is expressly founded upon the doctrine established in the *Jackson* case, *(supra)*, which, as has been shown above, applies a far more basic test and does not seem to sanction such technical distinctions bereft of substance and contrary to logic.[9] Surely, this Court never intended that the vital constitutional safeguards against unlawful and unreasonable searches and seiz-

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[7]But compare Footnote 3, *supra*. And note, that Sec. 331.21 of the Postal Manual (cited in the *Oliver* opinion, *supra*, at pp. 822, 823) specifically *includes* "Matter sealed or closed against inspection" in its definition of *first-class* mail.

[8]Even the government conceded, in the *Oliver* case, *(supra)*, that "letters and *other sealed matter*" are not subject to inspection, regardless of weight or classification. *Loc. cit.*, at p. 820 (Italics supplied).

[9]JOHNSON, J., speaking for the court in the *Oliver* case, *(supra)*, points this out in the following language: "* * * the discussion in *(Ex parte Jackson, supra)* was primarily purposed to make it doctrinally clear that, in the Government's monopolistic right to provide the public with mail facilities, it could not escape the guaranties of the Bill of Rights, and that as to the search-and-seizure guaranty of the Fourth Amendment it would be required, in its dealing with mail, to recognize a distinction between "what is intended to be kept free from inspection" and "what is open to inspection". We thus read the words, "such as letters, and sealed packages subject to letter postage", which immediately follow the first expression quoted, and the words "such as newspapers, pamphlets, and other printed matter, purposely left in a condition to be examined", which immediately follow the second expression quoted, as having been used in each instance simply in practical illustration and not in attempted judicial formula." *Loc. cit.*, at p. 821.

ures, and the federal policy against lawless police activities, should hang precariously in the balance of a postal scale.

The brief ruling in *Webster v. United States*, (CCA 6th, 1937), 92 F.2d 462, relied on by the government, seems only to strengthen petitioners' contention, by holding that postal inspection of "an unsealed package" *(sic)* does not constitute an unreasonable search and seizure. It is certainly a far cry from countenancing the interception of a sealed air mail parcel and cutting it open with a knife to enable federal law enforcement officers to seize incriminating articles. These they could have just as easily obtained by lawful means, except for the very attitude of contempt for legitimate procedures and law abiding practices, prevention of which appears to be the *raison d'être* of the federal judicial policy established and followed in the long line of decisions (cited above) of this Court, which "over and again * * * has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes".

United States v. Jeffers, (1951), 342 U.S. 48, 51, 72 S.Ct. 93, 96 L.ed. 59, 64.

3. THE DECISION OF THE COURT OF APPEALS HERE SOUGHT TO BE REVIEWED APPEARS TO HAVE SO FAR SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

This case is somewhat unusual in that the Court of Appeals here disposes of what petitioners believe are substantial constitutional issues by means of a *per curiam* opinion which, except for a brief recital of preceding procedural steps, consists of these two sentences:

> "Appellants' brief contains no specification of errors.[10] We have examined the record and have found no reversible error."

It should be admitted that the brief submitted for appellants in the Court of Appeals was somewhat artlessly drawn and did, indeed, fail to contain a "specification of errors" so designated. However, it did incorporate, by reference, the specifications contained in appellants' "statement of points on appeal" which was part of the record before the Court of Appeals[11] and it discussed, perhaps not too lucidly but

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[10]Rule 18(2)(d) of the Rules of the U. S. Court of Appeals for the Ninth Circuit reads in pertinent part, as follows: "(Appellants') brief shall contain * * * (d) In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged".

[11]Appellants' brief contained the following statement: "For the purposes of this brief, appellants will divide and argue the Statement of Points on Appeal (TR 37) as follows: *Conspiracy Question* * * *. *Constitutional Question* * * *. The lower court erred in denying appellants' motion to suppress the evidence contained in Exhibits D, E, F, G, H, I, J, and K, and erred in admitting the same into evidence." One wonders if Sentence No. 1 of the quoted *per curiam* opinion does not overstate the technical case for affirmance?

certainly recognizably, the important constitutional questions involved. The three judges who heard the appeal would seem to have been unduly impressed by the importance of this technical deficiency, summarized in the first sentence of their opinion. Otherwise it is doubtful that the second sentence would have been stated, without at least a cursory discussion of the substantive questions of law clearly involved in the case.[12]

Maybe this Honorable Court, if it hears this case, might ultimately agree with the finding of the Court of Appeals that there was no reversible error in the trial record. Yet it does not seem unreasonable to express the wish that the learned panel below had seen fit to express their views on the important constitutional issues affecting the ultimate destiny of these petitioners, despite the failure of their counsel to make literal compliance with a local procedural rule.

In the proceedings had below, upon a petition for rehearing and for hearing *en banc*, the appellants (on May 8, 1958) submitted another brief, containing a proper (as to form) specification of errors and discussing more specifically the applicable decisions of this Honorable Court. Yet this petition was considered and denied, without opinion, by only two remaining judges of the original panel,[13] a third unfortu-

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[12]The learned panel below deemed it appropriate, however, to devote a full sentence (in a footnote) to a listing of the alleged aliases of one of the petitioners.

[13]Rule 23 of the United States Court of Appeals for the Ninth Circuit provides in pertinent part "* * * All petitions for rehearing * * * shall be addressed to and be determined by *the court as*

nately having been eliminated by the untimely passing of the late Judge Dal M. Lemmon, on April 26, 1958.

Thus, summarizing, we find the District Court admitting evidence leading to a conviction, in apparent violation of clear constitutional mandates as interpreted by several leading decisions of this Honorable Court and entering its judgments without, even in passing, expressing any opinion upon the constitutional questions and rights of the petitioners here involved; followed by a two-sentence *per curiam* opinion of the Court of Appeals, affirming the convictions, again without reference to the important federal questions involved; and finally, only two judges considering and denying, once more without comment, rehearing, thus precluding discussion for the first time of the important issues petitioners believe to have been raised by this record.[14] One would suppose that under our cherished judicial system these petitioners should at least have been privileged, before the prison doors

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constituted in the original hearing. Should a majority of the court *as so constituted* grant a rehearing, etc. * * *" (Italics supplied). While the Court of Appeals thus appears to have held petitioners to a strict application of its Rule 18, *(supra)*, it seems to have had no difficulty in glossing over the unavoidable denial of the obvious benefits to petitioners which would flow from strict application of Rule 23. Having refused, in effect, to consider on original hearing the issues raised by the appeal, because of alleged technical non-compliance with Rule 18, the court below, when prevented by *force majeure* from itself complying with the requirements of Rule 23, ought in fairness to have granted a rehearing, on the possibility that the deceased member of the original panel might have so voted, and persuaded one of the other two to concur. As it is, *one* judge (instead of the majority required by the Rule) could (and may) have prevented rehearing.

[14]Because of the dearth of opinion below, the issues presented have been treated somewhat more fully in this petition.

clang shut behind them, to be enlightened by appropriate judicial discussion, however brief, as to the reasons why it was deemed their appeal to sacred constitutional rights must be in vain. It is respectfully submitted, that no man in this country should be deprived of his liberty, crying aloud for the shield of the Bill of Rights, amidst such judicial silence. It is hoped that this Honorable Court will grant, perhaps for the first time in this case, an opportunity for that serious consideration of the constitutional rights of these petitioners which it is earnestly contended they deserve, no matter what the ultimate outcome might be on the merits. Nothing, we submit, could more quickly undermine the foundations of constitutional government than for the courts to answer the pleas of those in the toils of relentless criminal prosecution by cursory reference to a procedural rule book. As was said by this Court in *Gouled v. United States, (supra)*:

> "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."
>
> *loc. cit.*, at p. 313.

Nor should it be permitted to become a substitute for forthright judicial scrutiny of an asserted invasion of such right.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
July 14, 1958.

Respectfully submitted,
EDGAR PAUL BOYKO,
Attorney for Petitioners.

BOYKO, TALBOT & TULIN,
MCNEALY & MERDES,
Of Counsel.

(Appendices A, B and C Follow.)

Appendix A

United States Court of Appeals
Ninth Circuit

No. 15,667

Lorenzo White, Joyce Harper and Ruby Fields,
Appellants,

vs.

United States of America,
Appellee.

April 11, 1958.

Defendants were convicted in the United States District Court for the Territory of Alaska, Fourth Division, Vernon D. Forbes, J., for unlawful transportation of narcotic drugs, unlawful importation of narcotic drugs and conspiracy to defraud the government, and they appealed. The Court of Appeals found no reversible error.

Affirmed.

Criminal Law 1182

Convictions, for unlawful transportation of narcotic drugs, unlawful importation of narcotic drugs and conspiracy to defraud the government, were affirmed. 26 U.S.C.A. (I.R.C. 1954) §§ 4724(b), 7237(a); 18 U.S.C.A. §§ 371, 1716; Narcotic Drugs Import and Export Act, §2(c) as amended 21 U.S.C.A. § 174; U.S.Ct.App. 9th Cir., Rule 18, subds. 1, 2(d), 28 U.S.C.A.

Robert J. McNealy, Everett W. Hepp, Fairbanks, Alaska, for appellants.

George M. Yeager, U. S. Atty., Paula A. Tennant, Asst. U. S. Atty., Fairbanks, Alaska, for appellee.

Before MATHEWS, HEALY and LEMMON, Circuit Judges.

PER CURIAM.

On May 25, 1956, appellants (Lorenzo White, Joyce Harper and Ruby Fields[1]) and others were indicted in the District Court for the Territory of Alaska. The indictment was in seven counts. Count 1 charged appellants with having violated § 4724(b) of the Internal Revenue Code of 1954, 26 U.S.C.A. § 4724(b).[2] Count 2 charged appellants with having violated 21 U.S.C.A § 174. Counts 3 and 7 charged appellants with having violated 18 U.S.C.A. § 371. Counts 4 and 5 did not charge any of the appellants with any offense. Count 6 charged Fields with having violated 18 U.S.C.A. § 1716, but did not charge White or Harper with any offense. Appellants were arraigned, pleaded not guilty, had a jury trial, were found guilty as charged, were sentenced[3] and have appealed. Appellants' brief contains no specification of errors.[4] We have examined the record and have found no reversible error.

Judgments affirmed.

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[1]Also known as Ruby Jeanette Fields, as Ruby Mayfield and as Pearline Adams.

[2]Penalties for violating § 4724(b) are prescribed in § 7237(a) of the Internal Revenue Code of 1954.

[3]Three judgments were entered—one sentencing White, one sentencing Harper, one sentencing Fields.

[4]Footnote indicated, but apparently omitted.

Appendix B

United States Court of Appeals for the Ninth Circuit

No. 15,667

Lorenzo White, Joyce Harper and Ruby Fields,
Appellants,
vs.
United States of America,
Appellee.

JUDGMENT

Appeal from the District Court for the Territory of Alaska, Fourth Division.

This cause came on to be heard on the Transcript of the Record from the District Court for the Territory of Alaska, Fourth Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgments of the said District Court in this cause be, and each of them hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: April 11, 1958

PAUL P. O'BRIEN, Clerk.

Appendix C

Government's Exhibit No.	Government's Ident. No.	Description	How Obtained by Federal Officers	Defendants' Motion to Suppress	Defendants' Objections to Admission and Admission in Evidence
F	1	Cardboard box and brown paper wrapper sent through mail by Petitioner Fields	Intercepted *en route* and cut open, without warrant	TR 136-153	TR 125-127, 131
H	3	Part of dress belonging to Petitioner Fields, with cleaning tag	Taken from Gov't's Exh. F, *(supra)*, without warrant	TR 136-153	TR 125-127; 132, 134
I	2	Other part of dress belonging to Petitioner Fields (Gov't's Exh. H)	Taken from Gov't's Exh. F, *(supra)*, without warrant	TR 136-153	TR 125-127, 134, 135
J	15	Two glassine envelopes alleged to have contained approx. ¼ oz. of heroin	Taken from Gov't's Exh. F, *(supra)*, without warrant	TR 155, 157	TR 157
K	14	Box containing heroin, transferred by Gov't agents from Exh. J	See Gov't's Exh. J, *(supra)*	TR 159	TR 159
O	19	Velvet belo ging to Petitioner Fields, with leaning ticket attached	Seized from accused's home after search incident to arrest without warrant	TR 188	TR 188, 189
P	20-A	Detached cleaning tag, belonging to Petitioner Fields	Seized from top of dresser in accused's home as in case of Gov't's Exh. O, *(supra)*		TR 193
Q	20-B	Detached cleaning tag, belonging to Petitioner Fields	Seized from inside a jewel box in accused's home, as in case of Gov't's Exhs. O and P, *(supra)*	TR 199	TR 199